NG KHENG YEOW

v.

CHIAH AH FOO & ORS.

SUPREME COURT, KUALA LUMPUR
LEE HUN HOE CJ (BORNEO)
WAN SULEIMAN SCJ
SYED AGIL BARAKBAH SCJ
[CIVIL APPEAL NO. 378 OF 1985]
21 FEBRUARY 1987

LAND LAW: *Priority of caveats - Competing equities - Who had the better equity - Breach - Whether there was waiver.*

This was an appeal by the appellant against the order of the trial Judge in setting aside the caveat and the injunction and awarding damages to the 4th respondent without a full trial. The vendors (the 1st 3 respondents) contracted to sell a piece of land to the 4th respondent on 18 March 1982. On 23 April 1982 they executed another agreement with the appellant. The 4th respondent lodged a caveat on 19 August 1982 while the appellant had lodged another caveat earlier. In July 1984 the title deed was given to the 4th respondent when he paid the full purchase price. The question was one of competing equities.

Held:

[1] The vendors had waived the breach of the 4th respondent by accepting the final payment by the latter. The agreement between the appellant and the vendors was terminated as a result of the breach.

[2] There was no interest against which the appellant's caveat could lie.

[3] The 4th respondent has better equity since he entered into the sale agreement with the vendors first and had paid the full purchase price and thus he became a beneficial owner.

[Appeal dismissed with costs.]

Cases referred to:

Eng Mee Yong & Ors. v. V. Letchumanan [1979] 2 MLJ 212
Macon Engineers Sdn. Bhd. v. Goh Hoot Yin [1976} 2 MLJ 53
Piang Hong Yon & Ors. v. Syarikat Seri Belian Sdn. Bhd. [1983] CLJ (Rep) 324
Haroon bin Guriaman v. Nik Mah bte Nik Mat & Anor [1951] MLJ 209
Chatib bin Kari v. Mosbert Bhd. [1984] 2 MLJ 67
Crosbie-Hill v. Sayer [1908] 1 Ch. 866
Zeno Ltd. v. Prefabricated Construction Co. (Malaya) Ltd. & Anor. [1967] 2 MLJ 104
Butler v. Fairclough [1916-17] 23 CLR 78
Syed Ibrahim bin Syed Abdul Rahman v. Liew Su Chin [1984] 1 MLJ 160

For the appellant - Yusuf Khan; M/s. Yusuf Lee Pathma & Marbeck
For the 4th respondent - Lim Seong Chun; M/s. Ngan & Chen

JUDGMENT

Lee Hun Hoe CJ (Borneo):

This is an appeal against the order made by the learned Judge in setting aside the caveat and the injunction and awarding damages to 4th respondent without a full trial.

The first three respondents ("the vendors") owned a piece of land described as geran no. 5700 for Lot 87 in the district of Pusing together with the building known as No. 16, Lahat Road, Pusing, Perak ("the land"). They charged "the land" to the Malayan Banking for RM50,000 for overdraft facilities. On 18 March 1982 they executed an agreement to sell "the land" to the 4th respondent. By way of deposit and part payment 4th respondent paid them RM28,000. The balance of RM47,000 was to be made within one month from 27 July 1982 to settle the overdraft facilities. If it was insufficient then the vendors would have to settle with the bank, 4th respondent was entitled to specific performance of the agreement. On 23 April 1982 they executed another agreement to sell "the land" to the appellant, also for RM75,000. The appellant paid a deposit of RM25,000. As to the balance of RM50,000 the appellant agreed to redeem "the land" within 6 months from the bank with the balance. On 19 August 1982 the 4th respondent lodged a caveat. The appellant had lodged a caveat earlier.

Sometime in July, 1984 the 4th respondent deposited a cheque for the sum of RM47,000 with Messrs. Ngan & Tan, the bank's solicitors. Eventually, the discharge of the charge was duly executed, the title deed was given to 4th respondent. The vendors had executed the memorandum to transfer in form 14A in favour of 4th respondent's nominees, Lim Bee Bee (f) and Lim Ching Wan. Apart from caveating "the land" the appellant also obtained an order dated 24 October 1983 restraining the first three respondents from transferring, selling, disposing of or otherwise encumbering "the land". The 4th respondent contacted the appellant asking him to withdraw the caveat but he refused. The appellant showed the 4th respondent his agreement which was more than a month later than the 4th respondent's agreement. Because of non-payment of the balance of the purchase price by the appellant there was a serious breach of the terms of the agreement. Clause 5 of the agreement makes time the essence of the agreement. By paying the full purchase price the 4th respondent had become the beneficial owner. The first three respondents were merely bare trustees for the 4th respondent. There was therefore no interest against which the appellant's caveat could lie.

The appellant contended that the learned Judge was wrong in law. The burden was on the respondent. The question was whether the caveat was wrongfully entered or entered without reasonable cause. In this case there were competing equities. It was submitted that when faced with these facts the learned Judge should not set aside the caveat and the injunction but to decide on the conflicting equities. In support the following cases were cited:

Eng Mee Yong & Ors v. V. Letchumanan [1979] 2 MLJ 212;
Macon Engineering Sdn. Bhd. v. Goh Hoot Yin [1976] 2 MLJ 53;
Piang Hong Yon & Ors. v. Syarikat Seri Belian Sdn. Bhd. [1983] CLJ (Rep) 324;
Haroon bin Guriaman v. Nik Mah bte Nik Mat & Anor. [1951] MLJ 209;
Chatib bin Kari v. Mosbert Bhd. [1984] 2 MLJ 67.

Although both the appellant and the 4th respondent were in breach of the terms of the agreement in respect of the final payment the vendors had waived the breach against the 4th respondent by accepting the final payment made by the latter. The appellant only offered to make the final payment on 16 May 1983 but the vendors refused to accept and finalise the discharge of the charge. As a result of the breach the vendors were entitled to treat the agreement as terminated.

On the facts of this case the entry of a private caveat by one party does not necessarily mean that he has better priority against another who has not as yet lodged one. In *Crosbie-Hill v. Sayer* [1908] 1 Ch.866 @ 875 on the question of priority Parker J stated at p. 875:

> ... The mortgages to the plaintiffs and the mortgage to the first two defendants are thus all of them equitable mortgages only, and the question I have to decide is whether the plaintiffs or these two defendants have the better equity...

This passage found support in *Zeno Ltd. v. Prefabricated Construction Co.(Malaya) Ltd. & Anor.* [1967] 2 MLJ 104 where the Federal Court held, *inter alia,* that the caveat established priority and the onus was therefore on the holders of a subsequent equity to show facts which rendered it inequitable for the holder of a prior equity to insist as against him on that priority. Although priority in time is the ordinary test, in the final analysis where evidence discloses some act or omission on the part of the holder of a prior equity the rule that "who has the better equity" as stated by Parker J in *Crosbie-Hill v. Sayer* (*supra*) applied.

In the Australian case of *Butler v. Fairclough* [1916-17] 23 CLR 78 reference may be made to a passage by Griffith CJ who expressed similar sentiments:

> ... In the case of a contest between two equitable claimants the first in time, all other things being equal, is entitled to priority. But all other things must be equal, and the claimant who is first in time may lose his priority by any act or omission which had or might have had the effect of inducing a claimant later in time to act to his prejudice. Thus, if an equitable mortgagee of lands allows the mortgagor to retain possession of the title deeds, a person dealing with the mortgagor on the faith of that possession is entitled to priority in the absence of special circumstances to account for it.

In *Syed Ibrahim bin Syed Abdul Rahman v. Liew Su Chin* [1984] 1 MLJ 160 @ 163 the Federal Court made clear that:

> ... It is of course quite right to say that it is undesirable to resolve disputes on affidavit evidence. Yet Judges are expected in applying the test to be critical of the affidavit evidence which must on the fact be at least plausible. As Lord Diplock said in *Eng Mee Yong's* case at p. 217:
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> ... In making such order on the application as he "may think just" the Judge is vested with a discretion which he must exercise judicially. It is for him to determine in the first instance whether statements contained in affidavits that are relied upon as raising a conflict of evidence upon a relevant fact have sufficient *prima facie* plausibility to meet further investigation as to their truth. Since this is a matter upon which the opinion of individual Judges may reasonably differ, an appellate Court ought not to interfere with the Judge's exercise of his discretion under s. 327 of the National Land Code unless the way in which he exercised it is shown to have been manifestly wrong.

The submission of the 4th respondent that he has better equity is well founded. He entered into the sale agreement with the vendors first. He had paid the full purchase price. The vendors had executed the memorandum of transfer in his favour. Also, most important the title deed is in his possession. He had become the beneficial owner. The only thing against him is that he entered the caveat later than the appellant. However, we are satisfied that on the facts he has the better equity.

We cannot say the learned Judge was wrong in the order he made in the circumstances. The appellant has not been able to persuade us to interfere with the decision of the learned Judge. Accordingly, we would dismiss the appeal with costs. Deposit to respondents on account of taxed costs.

Also found at [1987] 2 CLJ 108